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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No.....

FINSTERWALD FURNITURE COMPANY,
a Delaware corporation,
Petitioner (Appellant below),
vs.
FINSTERWALD CLOTHING COMPANY,
a Michigan corporation,
Respondent (Appellee below)

PETITION FOR WRIT OF CERTIORARI

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed Record)

To the Honorable, the Chief Justice, and the Associate Justices of the United States:

The above named petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered June 6, 1941, affirming a decree of the District Court of the United

States for the Eastern District of Michigan, Southern Division, restraining petitioner from selling men's clothing under its own corporate name.

OPINIONS BELOW

The opinion of the District Court (394) confirms a Special Master's report (357). The opinion of the Circuit Court of Appeals (409) was filed June 6, 1941.

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was entered June 6, 1941.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

This suit involves a fundamental question of free trade. The petitioner, Finsterwald Furniture Company, a Delaware corporation, and the respondent, Finsterwald Clothing Company, a Michigan corporation, have both been doing business in the City of Detroit, Michigan, for over thirty years under their respective corporate names. The respondent has limited its business to the sale of men's and boy's clothing and haberdashery. Petitioner originally limited its business to the sale of furniture but during the course of the years added various departments, until now it is virtually a department store selling sporting goods, electrical appliances, radiators, refrigerators, blankets, jewelry, phonographs, curtains, draperies, dishes, optometrists' supplies, women's clothing, automobile tires and

batteries (359). Shortly before the institution of this litigation by the respondent, petitioner added a clothing department in order to meet the competition of its competitors in the City of Detroit, and in conformity with the growing trend of business concerns of its nature throughout the country to add clothing departments. This decision was arrived at without regard to the existence of respondent's business. The Special Master made a finding (363):

> "* * * that the defendant has reached a stage in its development when it would want to sell clothing, irrespective of the existence of plaintiff, that its dominant motive is to expand its own business rather than to capitalize upon the good will of the latter."

The respondent brought suit to restrain the petitioner from selling clothing under its present corporate name, claiming that to permit petitioner to do so would result in unfair competition for the respondent. It is admitted that there is no question as to the proprietary right of petitioner to use its corporate name (24). Nor is there any question concerning the good faith of the petitioner. The Special Master found (364) that the case presents:

> "* * * an honest conflict between two substantial business interests: that of plaintiff in selling its goods free from confusing competition by one using a similar name, and that of defendant in expanding its business under its own name."

The petitioner's position rests squarely upon its right legitimately to have and exercise the trade benefits attaching to its own name as it has continued to do for the past thirty years. The respondent concedes the proprietary right of the petitioner to its own name (24).

The respondent claims, however, that by reason of the inclusion of the word "Finsterwald" *in its own name,* it will suffer in a competitive market through the *continued use* by the petitioner, Finsterwald Furniture Company, *of its own name.* The respondent's position is that while the "Smith Furniture Company" could compete with the Finsterwald Clothing Company, the Finsterwald Furniture Company must not do so. Its demand to be protected from the competition of the petitioner does not arise from a *claimed superior right to the word "Finsterwald."* It is made to rest entirely upon the claim that the circumstance of the same dominant word in both names must be submitted to by the petitioner as a restriction upon its right normally to compete and to exploit its long accumulated good will as a department store.

The trial court expressly bases its order of restraint upon the ground that the respondent may lose business in a competitive market to the petitioner. The fact alone of competition is denounced as a vice. To take business from a competitor is called a wrong and in itself is made to carry an unlawful intent (403, 399 and 401):

> "• • • If the defendant says he fell out of some other man's bed room window at four o'clock in the morning, the Court doesn't have to believe him when he says he didn't intend to steal the money. The Court can apply the old doctrine that a person is presumed to intend the natural consequences of his acts."
>
> "• • • That is the only change I want to make in the Master's findings. I want to find on this record, not as a fundamental fact and not as a fact that any witness has testified to, unless it be the defendants themselves, that it was the intention of the Finsterwald Furniture Company to produce the wrong complained of in this case• • •"

"I do not want to be misunderstood about anything I have said or do say about the Master's findings that if there was no similarity of names, the Finsterwald Furniture Company would still engage in the clothing business. I say *that is a finding of fact irrelevant to this lawsuit.* I have no doubt that the Furniture Company has several reasons behind its attempt to sell clothing. One of the reasons it gives is that some of its competitors who were in the furniture business are also engaged in the clothing business* * *"

"As I said to the counsel for defendant in the argument, it is like a white slave case, where we have to get at the motive. What is the purpose of taking a female from Detroit to Chicago? The defendant will always try to side-track the jury by the argument that there was a World's Fair or a ball game or something else that was the motive for his going there. However, it is not for the jury and the courts to find out whether that was the motive or not, because that is irrelevant. You think about all those things for the purpose of determining whether or not the trip was made for an immoral purpose." (Italics supplied.)

The obvious fact that competition for patronage is the common objective of every lawful trade endeavor is lost in a confusion of reasoning bearing no relationship to the legal issues. Nor did the petitioner find in the Circuit Court of Appeals a consideration of the position which it has so earnestly advanced. The only reasons for the rejection of its appeal is found in the order of the Circuit Court of Appeals (409) providing:

"It is ordered, adjudged and decreed that the decree appealed from be and the same is in all things affirmed upon the grounds and for the reasons set forth in the opinion of the District Court found at page 394 *et seq* of the transcript of record."

In order to allay respondent's fear of possible confusion, petitioner offered to observe the following practices to be made mandatory by decree:

> "1. The advertising and publicity matter of the defendant will be characterized by a signature cut in the form of Exhibits 15, 16 or 17, whichever the plaintiff prefers, which consists of the full corporate name of the defendant, equal emphasis and significance being given to all words of the name, and all words of the name being set up in letters of the same size and type. The defendant will not use the name of Finsterwald alone anywhere in any advertising or publicity matter in which clothing is advertised; wherever the name Finsterwald is used in relation to clothing, the full corporate name shall be used, uniform prominence in every instance being given to the word 'Furniture.'
>
> 2. The defendant will never advertise or distribute any publicity material in which clothing shall be the sole item of merchandise offered for sale, but instead all advertising and publicity material relating to clothing will form a part of advertisements dominated by offerings of furniture or other home furnishings and the items of clothing included in such publicity material or advertisements will form a subordinate or included part.
>
> 3. The defendant's clothing department will be situated upon the fifth floor of its building. No article of clothing will be offered for sale on the main floor of the building; there will be no display of clothing in the windows of the defendant's store which does not also include furniture or home furnishings as a composite part.
>
> 4. The articles of clothing offered for sale by the defendant will not bear any label with the defendant's name upon it, or any part of such name. Instead, such clothing will be labeled with the name 'Harrington' or 'Harrington De-Luxe'.

5. The defendant will include in the package in which any article of clothing sold by it is enclosed, a card, a copy of which is attached to the 'Defendant's suggestions with relation to the sale of clothing, etc.,' setting forth in definite terms that the article is purchased from Finsterwald Furniture Company, the defendant, which is in no way connected with the plaintiff.

6. To change the large front vertical sign upon its building so that its full corporate title is shown thereon."

The Court rejected this offer and entered a decree (391) permanently restraining petitioner from engaging in the retail sale or advertisement of men's and boy's clothing, wearing apparel and haberdashery under its present corporate name or any other name in which the word "Finsterwald" or "Finsterwald's" is the dominant word, with the proviso that petitioner be permitted to sell men's clothing if it changes its name to a compound name which may include "Finsterwald" or "Finsterwald's" as the *second* word in such name with some other major name as the first word (such as, by way of illustration, the name "Hadley-Finsterwald Furniture Company"). Petitioner was also restrained from advertising the sale of clothing with any advertising which uses the word "Finsterwald" or "Finsterwald's" except for a statement in type, not to exceed ten point underneath the clothing store signature, "Operated by Finsterwald Furniture Company," or words of similar import.

Petitioner was also restrained from exhibiting or selling men's clothing on the first floor of its store building and from exhibiting such clothing in its store windows.

Respondent had urged the possibility of confusion in the mind of the public and offered some testimony as to

such confusion in the past. It was conceded, however, that petitioner was not responsible for the confusion. The respondent's secretary testified (111):

> "Q. You made it quite clear, as a matter of fact, that the confusion which has existed up to this time is inherent in the use of the name Finsterwald?
>
> A. That's right, yes, sir.
>
> Q. You don't believe that that confusion results from any fraudulent conduct on the part of the Finsterwald Furniture Company, do you?
>
> A. No, sir."

QUESTIONS PRESENTED BY THIS PETITION

The questions presented in this case are:

1. May a corporation lawfully doing business under its own corporate name for more than thirty years, in the normal expansion of its business, add a clothing department thereto without presenting unfair and unlawful competition to another corporation with the same dominant word in its corporate name already engaged in the sale of clothing?

2. If it is found that the corporation already engaged in the sale of clothing is entitled to protection against confusion, does such right of protection extend to the deprivation of the other corporation's right to use its own name in the sale of clothing?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

1. The United States Circuit Court of Appeals for the Sixth Circuit has rendered a decision restraining a corporation from conducting and expanding its business under its own corporate name in conflict with the decisions of this Court and of other Circuit Courts of Appeals on the same matter. *John B. Stetson Co. v. Stephen L. Stetson Co.*, 85 Fed. Rep. (2d), 586 (Second Circuit); *Gleaves v. W. B. Fishburn Co.*, 82 Fed. (2d) 627 (Fifth Circuit); *Horlicks Malted Milk Corp. v. Horluck's Inc.*, 59 Fed. (2d) 13 (Ninth Circuit).

2. The United States Circuit Court of Appeals for the Sixth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions. *Young & Chaffee Furniture Co. v. Chaffee Brothers Furniture Co.*, 204 Mich. 293; 170 N. W. 48.

Wherefore petitioner prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination as provided by the statutes of the United States a full and complete transcript of the Record and all proceedings in the case numbered and entitled on its docket, "No. 8487, Finsterwald Furniture Company, a Delaware corporation, Defendant and Appellant, v. Finsterwald Clothing Company, a Michigan corporation, Plaintiff and Appellee," and that the decree therein of the said Circuit Court of Appeals be reversed by this Court, and that your petitioner may

have such other and further relief in the premises as to the Court may seem just and proper.

FINSTERWALD FURNITURE COMPANY,
Petitioner,

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